# DOCUMENT RESUME

ED 058 483 AA 000 787

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| AUTHOR | Whelan, Charles M.; Freund, Paul A. |
| TITLE | Legal and Constitutional Problems of Public Support for Nonpublic Schools. |
| INSTITUTION | Fordham Univ., New York, N.Y. School of Law. |
| SPONS AGENCY | President's Commission on School Finance, Washington, D.C. |
| PUB DATE | Nov 71 |
| NOTE | 110p. |
| EDRS PRICE | MF-$0.65 HC-$6.58 |
| DESCRIPTORS | Court Cases; *Educational Finance; Educational Legislation; *Federal Aid; Guidelines; Legal Problems; *Private Schools; Religious Factors; School Law; *State Aid; *State Church Separation; Supreme Court Litigation |

ABSTRACT

Two authors analyze the problems facing aid to nonpublic school education and review relevant court decisions, emphasizing the latest Supreme Court decisions on the subject. Charles M. Whelan provides an analytical framework for determining the constitutionality of various assistance forms. He suggests that each program should be submitted to three analytic levels: (1) the objective -- abstention from taxation or provision of positive assistance that requires an appropriation; (2) the form -- money, services, equipment, facilities, or material; (3) the channel -- direct recipient of the assistance (school, student, teacher, or parent.) Mr. Whelan notes a fundamental constitutional difference between "appropriation aid" and "tax benefits" in that appropriation aid, except in special cases, must be restricted to secular education while tax benefits need not be. Paul A. Freund examines specific types of proposed assistance and attempts to suggest which are legitimate. He discusses bus fares, other welfare assistance, textbooks, equipment and facilities, shared time, grants to pupils or families, tax deducations-credits, and preferential or exclusionary school policies. An appendix by both authors considers certain State and federal legislation plans, drafted before the Supreme Court decisions of June 28, 1971, that fall into two categories: grants to families and tax credits. (For related document, see ED 058 473.) (Author/JF)

# Legal and Constitutional Problems of Public Support for Nonpublic Schools

Submitted to The President's Commission on School Finance

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WE HAVE FOUND MUCH OF VALUE IN THEM FOR OUR OWN DELIBERATIONS. THE FACT THAT WE ARE NOW PUBLISHING THEM, HOWEVER, SHOULD IN NO SENSE BE VIEWED AS ENDORSEMENT OF ANY OR ALL OF THEIR FINDINGS AND CONCLUSIONS. THE COMMISSION HAS REVIEWED THIS REPORT AND THE OTHERS BUT HAS DRAWN ITS OWN CONCLUSIONS AND WILL OFFER ITS OWN RECOMMENDATIONS. THE FINAL REPORT OF THE COMMISSION MAY WELL BE AT VARIANCE WITH OR IN OPPOSITION TO VIEWS AND RECOMMENDATIONS CONTAINED IN THIS AND OTHER PROJECT REPORTS.

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# LEGAL AND CONSTITUTIONAL PROBLEMS OF PUBLIC SUPPORT FOR NONPUBLIC SCHOOLS

The Constitution and Public Assistance
  to Education in Nonpublic Schools
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November 1971

# The Constitution and Public Assistance to Education in Nonpublic Schools

A paper prepared for the

President's Commission on School Finance

by

Charles M. Whelan

September 13, 1971

Fordham University School of Law

New York, New York 10023

## 1. State of the Question

(a) Facts: Other studies prepared for the commission give detailed analysis of the many different types of aid already provided by the state and federal government for the education of students in nonpublic schools. Certainly the most common, and probably the most ancient, of such types of assistance is the exemption of nonpublic schools from ad valorem property taxes. The federal income, estate and gift taxes also provide substantial assistance, not only by exempting the income of nonpublic schools but also by encouraging contributions, gifts and bequests. Other types of tax benefits exist, notably the exemption of such schools from many sales and excise taxes.

Tax benefits are, however, essentially negative in nature. They do not provide funds directly for the schools, but permit the schools to retain funds from other sources that would be diminished if the taxes were imposed. On the other hand, there are many types of positive government programs; programs that do not force the nonpublic schools and their patrons to rely on funding from nongovernmental sources alone, but which, through the school, the teacher, the student or the parent, provide money, services or equipment for the education of students in nonpublic schools.

Many states, for example, bus children to parochial as well as public schools. Some states provide textbook assistance. The federal Elementary and Secondary Education Act of 1965 funds a variety of programs. Under laws recently passed in Maryland and Pennsylvania, parents of children in nonpublic schools would receive cash payments from the state to assist in the payment of tuition. Teachers are the beneficiaries of much federal and some state legislation.

The most direct program of public assistance to education in nonpublic schools was the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968, recently declared unconstitutional by the United States Supreme Court. The Pennsylvania program provided cash reimbursements directly to nonpublic schools for the cost of education they provided to their students in mathematics, modern foreign languages, physical sciences and physical education.

The Rhode Island Salary Supplement Act, also declared unconstitutional by the Supreme Court on the same day that the Pennsylvania law was invalidated, provided a 15% supplement to the salaries of eligible teachers in nonpublic schools. Payments were made directly to the teachers rather than to the schools at which they were employed. In addition to other requirements for eligibility, a teacher could teach in the nonpublic schools only those subjects required to be taught by state law or actually taught in the public schools.

From this rapid survey of the principal types of public assistance that have been and are provided to education in nonpublic schools, it is obvious that there are at least three levels of analysis to which each program can be submitted:

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| (1) | The Objective: | What is the purpose of the legislation: to abstain from taxation or to provide positive assistance that requires an appropriation? |
| (2) | The Form: | How is the assistance provided: in money, services, equipment, facilities or materials? |
| (3) | The Channel: | Who is the direct recipient of the assistance: the school, the student, the teacher or the parent? |

I do not mean to suggest that these are the only levels of analysis that are ever constitutionally relevant. They are, however, such obvious characteristics by which to classify existing programs of public assistance to education in nonpublic schools that they should be kept clearly in mind throughout the discussion that follows.

Two other factual aspects of public assistance to education in nonpublic schools need emphasis at the outset of any constitutional analysis. They are:

(1) Some forms of educational assistance are exactly the same for both public and nonpublic schools (for example, tax exemptions and transportation). Other forms are specially tailored for education in nonpublic schools (for example, the Pennsylvania and Rhode Island statutes declared unconstitutional by the Supreme Court). This second type of legislation is the result of a deliberate choice by the state to treat education in nonpublic schools less favorably than it treats education in public schools.

(2) Approximately 83% of all the children in nonpublic elementary and secondary schools are in Catholic schools. It is common to refer to these schools as "parochial" schools, but this common label obscures important differences of structure, especially at the high school level. Putting aside these differences for the moment, I wish to emphasize that anyone undertaking constitutional analysis of public assistance to education in nonpublic schools must reckon with the hard fact that 83% of the assistance will, at least for the time being, go to education in Catholic schools.

By this time I hope that my deliberate use of the phrase "aid to education in nonpublic schools," rather than the shorter and more conventional "aid to nonpublic schools," will have caught the attention of the reader. One of the basic facts of the American educational tradition is that the state and federal governments have sought to strengthen schools, not for their own sake as institutions, but as instruments for education that will benefit our state and national communities. The dividing line of sound analysis (constitutional or academic) must not be between types of schools but between types of education. Accordingly, I shall continue to speak of "aid to education" rather than "aid to schools."

(b) The Questions: Even before the recent decisions of the Supreme Court, analysis of the constitutionality of the various forms of existing and proposed public assistance to education in nonpublic schools was a complex matter. The recent decisions, except for their obvious foreclosure of public payments for parochial school teachers' salaries, have only made analysis more difficult. Nevertheless, five basic questions can be asked and, to some extent at least, answered:

(1) Are any, some or all of the existing forms of assistance constitutional or unconstitutional?

(2) Are other forms under current discussion, such as the tuition voucher plan or income tax deductions and credits,

constitutional or unconstitutional?

(3) If some forms are constitutional and some are not, what is the dividing line and why?

(4) If some forms are permitted by the First Amendment, to what extent is a state free under the Fourteenth Amendment to forbid (in the state constitution) any assistance to education in church-related schools?

(5) If some forms are permissible, what are the constitutional consequences (especially with regard to "religious preference" and racial segregation) of acceptance of these forms by church-related schools?

## 2. Legal Framework

Before beginning to answer these five questions directly, it will be helpful to dispose of certain basic matters. Why do nonpublic schools exist in a country where public school education is available to all children tuition-free? From the viewpoint of educational objectives, how does the education provided in nonpublic schools compare with that provided in public schools? Why have the state and federal governments, especially in the last ten years, subsidized education in nonpublic schools? What are the basic constitutional principles and policies applicable to the provision of public assistance to education in nonpublic schools?

(a) Why Nonpublic Schools Exist: Nonpublic schools exist because millions of Americans are seriously dissatisfied with the public schools available to them -- so seriously dissatisfied that they spend between $2 and $3 billion dollars a year on nonpublic school education rather than on better food, clothing, shelter and recreation. The causes of this dissatisfaction are manifold and by no means entirely religious. Opposition to desegregation has caused the creation of many private schools in the South. In a somewhat related sociological phenomenon, the desire of the wealthy for social exclusivity has caused the creation of a number of private schools across the nation. In areas where public school discipline has seriously deteriorated, failure of the authorities to take effective corrective action generates a movement towards nonpublic schools.

By far the most common motive, however, for parents' choice of nonpublic schools is the desire to integrate the child's secular education with his religious formation. Where the values inculcated by, or at least identified with, public school education are seen by parents as positively hostile to the religious beliefs that parents wish to transmit to their children, parents who are able to do so will send their children, to a nonpublic school of their own, or a similar, faith. This was the situation Catholics confronted during the formative period of the American public school establishment, and it remains the situation of such groups as the Amish today.

Even where the public school values are not seen as aggressively antagonistic, the religious vacuum engendered by public school attempts at "neutrality" is highly offensive to many deeply religious parents. School occupies so large a part of a child's life that it makes no sense at all to many parents to divorce the child's secular from his religious education. Accordingly, where parents of this type have the option to do so, they will choose a nonpublic school of their own, or a similar, faith over a public school with an entirely secular faith.

Finally, many parents feel that their efforts at home and the services and programs at their local church are inadequate to the task of religious education. This is particularly true of parents whose faith has a strong common-sense, intellectual or theological dimension. In their view, the effort to synthesize the data of reason and revelation is an ongoing, never-ending process. As scientists and scholars of all types open up the worlds of secular and religious reality, there is need for a continual refashioning of what is taught. Neither the parents nor the local clergyman are likely to have the time to keep abreast of all the developments or to instruct the children of the congregation about them. Accordingly, formal schooling is necessary, and where better than in the same school where the child receives his basic secular education?

Since Catholics operate most of the nonpublic schools in the country, it might be asked whether there is any motivation distinctive to Catholics and different from that of non-Catholic parents who choose nonpublic schools. In my judgment, there is not. Some might point to the Canon Law of the Roman Catholic Church, papal encyclicals and the decrees of the Plenary Councils of Baltimore. They would say that Catholics have to send their children to Catholic schools. This explanation, however, ignores two basic facts. First, the United States is almost the only country in the world where the Catholic Church has been successful in establishing a large network of elementary and secondary schools. It was 19th-century American Protestantism, not decrees from Rome, that created American Catholic schools. Secondly, even in the United States, only half of the Catholic children go to Catholic elementary schools and less than half to Catholic high schools. The only adequate explanation of this phenomenon is variations in the acceptability of public schools to Catholics in various parts of the country, in the financial resources of Catholics, and in their personal attitudes towards religious education.

(b) Objectives of Public and Nonpublic Schools: Most public and nonpublic schools are generally similar in their educational objectives. They seek to provide the basic information and skills necessary for economic and social survival. They try to inculcate loyalty to the American scheme of government and commitment to the American way of life. Neither type of school is ideologically "neutral" on fundamental human values, or indifferent to the economic and social success of its graduates.

When, however, it comes to religious education, there is one important difference between public and most nonpublic schools. With few exceptions, nonpublic schools openly profess a particular type of religion and attract support by holding out the hope that their students will be, from the religious point of view, both better educated and more deeply committed than if they went to public schools. Public schools, on the other hand, profess a religious "neutrality." This profession has often been more fictional than real, especially in rural school districts where most of the people belong to the same or substantially similar churches. Even in urban and suburban areas, where public schools are less likely to be identified with particular Protestant churches or a generalized form of Christianity, the public schools are much more careful to avoid direct conflicts with basic Christian or Jewish teachings than with those of many other religions or humanistic ideologies.

(c) Why Government Subsidizes Education in Nonpublic Schools:

Government support of education in nonpublic schools is a fact, and has been for a long time in American history. Whatever controversy there may be about particular forms of aid, there is no widespread movement to cut off nonpublic schools from tax exemptions or children attending those schools from participation in transportation, school lunch and health programs. The question, therefore, is not about whether any aid can or should be given, but about how much and in what form. The Supreme Court itself has recognized this very clearly in the Everson, Allen, Tilton, Lemon and DiCenso cases.

Regardless, however, of the constitutional justification for, and constitutional limitations on, public assistance for education in nonpublic schools, there is one simple and extremely clear reason why the state and federal governments, especially in the last ten years, have subsidized such education. Most nonpublic schools are located in metropolitan areas, and the public schools in those areas are in deep financial and academic trouble. A sudden, sizable influx of students from nonpublic schools into the public schools would only aggravate the existing problems of the public schools. Although the nonpublic schools are also in considerable financial difficulty, it does not cost the states anywhere near as much to help keep a student in a nonpublic school as it would to educate him in a public school. This situation may change; but until it does, states that are hard-pressed for funds have an obvious interest in helping parents who want their children in nonpublic schools to keep them there.

Except, possibly, in Rhode Island, there is no state in which Catholics have sufficient political strength, by themselves, to push through a law for the support of education in nonpublic schools. The fact that so many states have enacted such laws during the last ten years is ample proof that the legislatures recognize that the practical problems of American education in metropolitan areas cannot be solved without partial support of education in nonpublic schools.

This judgment of the states has been reinforced by that of the national Congress, as shown in the National Defense Education

Act of 1958, the Higher Education Facilities Act of 1963, and the Elementary and Secondary Education Act of 1965.

It is manifest, therefore, that the purpose of the churches in sponsoring nonpublic schools is not the same as the purpose of the government in helping to support education in such schools. The government is interested in seeing that all children receive the elements of a sound secular education. It does not -- or should not -- matter to the government whether a child receives that education in a public or a nonpublic school. Parents and the churches they attend, on the other hand, have a double purpose in maintaining nonpublic schools: to provide both a sound secular and a sound religious education.

(d) Basic Constitutional Principles and Policies: Whatever the economic arguments may be for public aid to education in nonpublic schools, it must be admitted that they are not constitutional arguments. There is no constitutional policy in favor of saving the government money. Mr. Justice Douglas put it pithily in his concurrence in Lemon vs. Kurtzman:

> And the argument is made that the private parochial school system takes about $9 billion a year off the back of government -- as if that were enough to justify violating the Establishment Clause.

Practical economics apart, what basic constitutional principles and policies are involved in public assistance to education in nonpublic schools?

Broadly speaking, I think the principles and policies can be grouped under two headings: Educational and Religious.

(1) Educational Principles and Policies:

This is not the place for a general treatise on the constitutional law of education. The constitution does not mention the word "education," but in the last 50 years the Supreme Court has been confronted with many constitutional issues in this area.

The first important school cases in the Supreme Court dealt with what the states cannot do. Of these cases by far the most important are Pierce vs. Society of Sisters and Pierce vs. Hill Military Academy, decided together in 1925. Oregon, following Nativist notions, passed a law compelling all children to attend public schools. The Supreme Court unanimously invalidated the law, holding that the state's interest in education did not extend that far. As Mr. Justice McReynolds explained for the court:

> Under the doctrine of Meyer vs. Nebraska, 262, U.S. 390, we think it entirely plain that the (Oregon) Act of 1922 unreasonably interferes

> with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (268 U.S. 534-35).

The Pierce cases have often been cited by the Supreme Court with approval, and formed an important part of the Supreme Court's reasoning when it upheld the New York textbook-loan program in the Allen decision of 1968. The two Pierce cases, one dealing with a Catholic school and the other with a non-denominational private school, stand for the principle that parents have a constitutional right to select nonpublic schools for their children, as long as the nonpublic schools meet the reasonable educational standards of the state. The educational policy behind this principle is clearly one of the limited competence of the government: "The child is not the mere creature of the state."

In numerous cases the Supreme Court has affirmed the right of the states to set reasonable educational standards and to engage in the support of secular education. The right of the federal government to engage in the support of education has never been directly passed upon by the Supreme Court, but there is no room for doubt that the court would uphold the right, at least under Congress' power to spend for the general welfare.

Together, therefore, with the principle that the government is not omnicompetent in education, the Supreme Court has affirmed that government is competent for some purposes, especially for setting reasonable standards and for providing financial support. The policy behind this principle of partial governmental competence is clearly one that is highly favorable to the education of American citizens. As Chief Justice Warren said for the court in the Brown desegregation decision in 1954:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child

> to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (347 U.S. at 493).

If the only constitutional prinviples and policies relevant to public support of education in nonpublic schools were those that deal with the mutual educational competence of the government and of parents, there would be no constitutional problem to discuss. The problem begins when we try to synthesize these principles and policies with those that the Constitution imposes in the area of religion.

(2) Religious Principles and Policies:

The First Amendment says quite simply: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first time the Supreme Court applied these words to the educational policy of a state was in the Everson decision of 1947. By a 5-4 vote the court sustained the right of New Jersey to reimburse parents of nonpublic school children for expenses they incurred in sending their children to school. New Jersey had earlier provided transportation services directly to children attending public schools.

Because children attending Catholic schools were involved in New Jersey's new reimbursement program, the bearing of the religion clauses of the First Amendment came into question. After setting forth the classical constitutional doctrine that financial support of religion as such by the government is forbidden, Mr. Justice Black had this to say for the majority of the court:

> On the other hand, other language of the (first) amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief. (330 U.S. at 16; emphasis in original).

The Everson case thus threw into sharp focus the indissoluble tension between the twin constitutional policies of No Establishment and Free Exercise of religion. Much ink has been spilled ever since, in the Supreme Court and elsewhere, trying to soften the constitutional knot. Perhaps the most candid exposition of the state of constitutional law in this area is to be found in Chief Justice Burger's majority opinion in the recent Lemon and DiCenso decisions:

> In Everson v. Board of Education, 330 U.S. 1 (1947), this Court upheld a state statute which reimbursed the parents of parochial school children for bus transportation expenses. There Mr. Justice Black, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Id., at 16. Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.
>
> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. . . .
>
> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). (Slip opinion, p. 7).

Despite the difficulties the Supreme Court has encountered in applying the enigmatic words of the First Amendment to a wide variety of practical situations, certain basic policies and principles have emerged. Perhaps the most important policies have been to preserve governmental neutrality in the field of religion, the maximum amount of individual religious freedom consistent with the achievement of vital governmental objectives, and a clear distinction between the functions of the churches and the functions of the government. Inevitably these policies have come into conflict with each other, and nowhere more sharply than in the field of education, both public and nonpublic.

In 1948 the Supreme Court held that the Constitution forbids the use of public school facilities, during regular public school attendance hours, for religious instruction of public school children by clergymen of their own faith. In 1962, and again in 1963, the Court forbade public school authorities to sponsor religious exercises as part of the public school day. It made no difference whether exemptions from attendance were granted to students who did not wish to participate; the exercises were totally forbidden, as outside the competence of the state. In 1968 the Supreme Court struck down an Arkansas statute that forbade the teaching of evolution in the public schools, on the ground that the statute was designed to support the fundamentalist interpretation of the creation narrative in the Book of Genesis.

From these cases dealing with religion in the public schools, the principle has emerged that, for a statute to be consistent with the No Establishment Clause of the First Amendment, the statute must have "a secular purpose and a primary effect that neither advances nor inhibits religion." This principle, as the Supreme Court itself has admitted, is not easy to apply. Moreover, as subsequent litigation proved, the principle is not the only criterion of statutory consistency with the No Establishment Clause.

In 1968 the Supreme Court sustained the New York textbook-loan program, under which all school children, public and nonpublic, in grades 7-12 were furnished secular textbooks at state expense. The court's opinion, written by Mr. Justice White, relied on the right of parents to choose nonpublic schools for the education of their children, the dual educational function (secular and religious) of church-related schools, the secularity of the assistance provided by the state, and the absence of any proof that the church-related schools would use the secular textbooks for religious purposes.

What the court had to say about secular education in church-related schools merits careful attention:

> Underlying these [earlier] cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education. (392 U.S. at 247-48)

This language, together with the actual decision upholding the textbook-loan program, makes it absolutely clear that the "secular purpose and primary effect" principle does *not* preclude all assistance to education in nonpublic church-related schools. At the same time, however, the Supreme Court was careful to point out that the books were being provided to the students, not to the schools, and that there was no proof that the processes of secular and religious training were so intertwined in church-related schools that the secular textbooks would be instrumental in the teaching of religion.

Not surprisingly, the Allen decision gave a tremendous boost to legislation for public assistance to education in nonpublic schools.The path now seemed open to much more than buses, and several states went directly to the center of the financial problem in education, the teacher's salary. Some states chose to reimburse the nonpublic schools for the costs of secular instruction; others chose to pay the secular teacher in the nonpublic school a supplement to his basic salary.

During this period the Supreme Court reformulated another long-standing principle of American church-state law and gave it the name of "no excessive entanglement." The occasion was the Walz case of 1970, which involved the constitutionality of exempting houses of worship from ad valorem taxes. The Supreme Court sustained the exemptions, not only because they were ancient and universal in American law, but also because they resulted in less entanglement of religion and government than would result if taxes were imposed on houses of worship.

In his opinion for the court in the Walz case, Chief Justice Burger wrote:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result--the effect--is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemptions, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. (397 U.S.at 674-75)

Thus the *Walz* principle of "no excessive entanglement" supplements the *Schempp-Allen* principle of "secular purpose and neutral secular effect." To be consistent with the No Establishment Clause, any government program of assistance to education in nonpublic schools must:

(1) have a secular rather than a religious purpose;

(2) accomplish that purpose by achieving a substantial secular effect that is religiously neutral in itself; and

(3) not result in an excessive entanglement of the government with religious matters.

In concluding this brief, general discussion of the basic principles and policies imposed by the Constitution in the areas of education and religion, I wish to emphasize that I have limited myself to those that are directly relevant to government assistance to education in nonpublic schools. Education and religion are broad topics; a full discussion of all the constitutional policies and principles that relate to them would take the work of a lifetime.

### 3. Approaching the Answers

Before setting forth my answers to the five questions proposed in section 1(b) of this paper, it is necessary for me to discuss the most recent Supreme Court decisions in the school aid area, Tilton, Lemon and DiCenso. In setting forth the basic constitutional policies and principles that are relevant to government assistance to education in nonpublic schools, I have already discussed the principal earlier cases. It may, however, be useful at this point for me to set forth a chronological table of the most important decisions, with a brief indication of their contents, so that the reader will find it easier to understand references to these decisions in my discussion of Tilton, Lemon and DiCenso.

### (a) Analysis of Supreme Court Decisions:

### Table of Leading Decisions

| | |
|---|---|
| 1925--Pierce | (right of parents to choose nonpublic schools) |
| 1947--Everson | (bus transportation permissible; government must not support religion as such, but also must not discriminate against individuals, with respect to general welfare benefits, on the basis of their religious belief or lack of it) |
| 1948--McCollum | (religious instruction by clergymen in public schools during public school hours unconstitutional; government may not support religious activities as such) |
| 1963--Schempp | (public school authorities forbidden to sponsor religious exercises by public school pupils in public schools; secular purpose and effect test) |
| 1968--Allen | (public loan of secular textbooks permissible; secular purpose and effect test) |
| 1968--Epperson | (state may not prohibit teaching about evolution in public schools; government may not support one religious belief in preference to another) |
| 1970--Walz | (tax exemptions for houses of worship permissible; no excessive entanglement test) |
| 1971--Tilton | (church-related colleges and the Higher Education Facilities Act of 1963; participation in construction grants for secular facilities upheld; purpose, effect and entanglement tests) |
| 1971--Lemon | (Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968 declared unconstitutional on basis of the entanglement test) |
| 1971--DiCenso | (Rhode Island Salary Supplement Act of 1969 declared unconstitutional on basis of the entanglement test) |

## Tilton, Lemon and DiCenso

Before proceeding to a substantive analysis of these decisions, it is necessary to clear away some technical but significant details. The first of these is that, although a total of six opinions was written in these three cases (two by Chief Justice Burger, two by Mr. Justice Douglas, and one each by Mr. Justice Brennan and Mr. Justice White), only the opinion of Chief Justice Burger in the Lemon-DiCenso cases is an "opinion of the Court," that is, one in which at least five members of the court agreed on the reasons as well as the result. Actually, eight members of the court, including the Chief Justice, joined in this opinion. In the Tilton case, the Chief Justice's opinion announced the judgment of the court, but the opinion is technically a "plurality opinion" because only three other justices (Harlan, Stewart and Blackmun) joined in it.

Mr. Justice Douglas wrote a concurring opinion in Lemon-DiCenso; his opinion was joined by Mr. Justice Black and Mr. Justice Marshall, but not by any other justice. In the Tilton case, Mr. Justice Douglas wrote a dissenting opinion, again joined by Black and Marshall but no one else. Mr. Justice Brennan wrote one opinion, in which he concurred in Lemon-DiCenso and dissented in Tilton. Mr. Justice White's opinion was a concurrence in the result in Tilton and, technically, in the result in Lemon-DiCenso;

in substance, however, Mr. Justice White's opinion is a strong but solitary dissent from Chief Justice Burger's opinion for the court in Lemon-DiCenso and the Chief Justice's plurality opinion in Tilton.

These details are significant because the only constitutional policies and principles on which a majority of the Supreme Court is agreed, with respect to public assistance to education in nonpublic schools, are those which are set forth in Chief Justice Burger's opinion in Lemon-DiCenso. The additional policies and principles set forth by Mr. Justice Douglas command only three votes; those set forth by Mr. Justice Brennan only one. Mr. Justice White's reasoning also enjoys only one vote, but it happens to be the swing vote in this area, because what we now have on the Supreme Court is this alignment of the justices:

| | |
|---|---|
| Burger | Douglas |
| Harlan | Black |
| Stewart | Marshall |
| Blackmun | Brennan |

The four on the left do not agree with the four on the right that all direct assistance to any educational institution that includes within its aims the propagation of a particular religion is unconstitutional. Mr. Justice White, joining the four on the left with respect to this point, makes a majority of five members of the court who say that some forms of direct assistance, for the purpose of advancing secular education, are permissible. Mr. Justice White, indeed, would go quite far--far enough, at least, to sustain the constitutionality in principle of the Pennsylvania purchase-of-services program and the Rhode Island supplements for teachers' salaries. The other four justices (Burger, Harlan, Stewart and Blackmun) would sustain the right of the government to provide church-related schools with "secular, neutral, or non-ideological services, facilities, or materials."

This is a critical point for the future of constitutional decisions on government aid to education in nonpublic schools. So that there will be no doubt that the point is valid, I will quote what the Chief Justice says for the court in Lemon-DiCenso and for himself and three others in Tilton:

> The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. (Lemon-DiCenso, Slip Opinion, pp. 11-12)

> The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides. Our cases from Everson to Allen have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend. (Tilton, Slip Opinion, p. 14)

In these two passages, almost identical in the critical words, we find the central nerve dividing the eight justices who agreed in Lemon-DiCenso into opposing camps of four each in Tilton. Douglas, Black, Marshall and Brennan, indeed, agreed with the Chief Justice's formulation in Lemon-DiCenso, but they did not understand it as permitting direct provision to the church-related school of anything. In their interpretation, the pupil (or possibly the parent) was the only permissible channel of educational assistance. The Chief Justice himself, however, together with Justices Harlan, Stewart and Blackmun, understands the formula as meaning that some forms of assistance can be provided directly to (I would have preferred through) the church-related school.

One final point on this crucial difference between the justices: children attending church-related schools may participate, through the schools, only in those "services, facilities, or materials" that the state also provides to all other school children. Legislation that would give church-related school children special privileges, not enjoyed by children in other schools, public and private, would obviously be unconstitutional.

## Lemon-DiCenso: The Opinion of the Court

Now that we have examined the principal division among the justices, it is appropriate to examine the policies and principles on which eight of them were united. These are set out in Chief Justice Burger's opinion for the court in Lemon-DiCenso.

After describing the Pennsylvania and Rhode Island statutes, the Chief Justice states:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

The Chief Justice says that the Pennsylvania and Rhode Island statutes pass the first test (secular legislative purpose) but that they flunk the third (excessive entanglement). He expresses no opinion about the second test, saying that it is unnecessary to decide the question since the statutes are definitely unconstitutional under the third test.

The silence of the court on the second test, however, may be of some significance. In all probability, the justices were divided among themselves on the meaning of the Schempp-Allen test that requires a "primary effect that neither advances nor inhibits religion." Because of this divergence in interpretation, the justices could not agree whether the statutory restrictions employed by Pennsylvania and Rhode Island "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former" were, or were not, sufficient to restrict the principal or primary effect of the programs to a secular result religiously neutral in and of itself.

In any event, there is nothing in the court's opinion in Lemon-DiCenso to clarify the obscurities inherent in the Schempp-Allen requirement of a "primary, secular, neutral effect." Despite this lack of clarification, there is no doubt that the requirement still holds with respect to "appropriation aid," that is, programs of assistance to education in nonpublic schools that require affirmative funding by the government through appropriations. From the constitutional point of view, "appropriation aid" must be carefully distinguished from "tax benefit aid," that is, aid that does not require any positive expenditure by the government but which results from the granting by the government of such tax benefits as exemptions, deductions, credits or any other tax device that lessens the tax liability that would otherwise exist.

The Schempp-Allen requirement of a restriction of public aid to the secular aspects of education in nonpublic schools has never been held to apply to "tax benefit aid." The exemption of the property of church-related schools, for example, from local property taxes has never been limited to that part of the property that is used exclusively for secular education. Similarly, in the federal income tax, the deduction allowed individuals for contributions to such schools has never been limited to contributions for secular education. In the Walz case, where the Supreme Court was dealing with the traditional property tax exemptions for houses of worship, the court was satisfied that the "secular effect" test was met by the fact that exemptions resulted in less entanglement than taxation would have. The same argument would apply in the case of all types of tax benefits in which nonpublic schools, their students, parents, teachers and sponsors participated as members of the class either of all educational institutions or all exempt organizations.

(If tax benefits were limited specifically to nonpublic schools, or one of their constituencies, the parallel with Walz would not be perfect, and questions of preferential treatment of religion--since 83% of all nonpublic school students are Catholics--might arise.

As I have already indicated, the Chief Justice indicates early in his Lemon-DiCenso opinion for the court, that the constitutional flaw of the Pennsylvania and Rhode Island programs is the excessive entanglement they engender or foster between government and religious authority and concerns. As I read the opinion, I detect a certain embarrassment on the part of the court at the lack of evidence that such entanglement had actually happened. Nevertheless, the court was convinced that it might and probably would happen, and struck down the statutes on their potential for impermissible entanglement.

This is an important point for the immediate future, whatever the long-range outlook may be. In the history of the court there have been several periods (for example, the early New Deal years) in which a majority of the justices invalidated new governmental programs because of their potential for harm rather than because of what they actually did. Such periods have been followed by a retreat by the court from the "potential," or "parade of horrors," argument. The retreat, however, usually takes some time; and, for the immediate future, the potential for excessive entanglement is just as fatal to constitutionality as actual excessive entanglement.

In explaining how the Supreme Court determines whether government entanglement with religion is excessive, the Chief Justice says that "we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

From this point on, the Chief Justice writes as if only Roman Catholic schools were the beneficiaries of the Pennsylvania and Rhode Island programs. Especially with regard to the Pennsylvania case, this is a serious deficiency in the court's opinion and has led to unnecessary confusion about the impact of the court's decision on private, nonsectarian schools in Pennsylvania. Nevertheless, the fact that the court proceeded in this way demonstrates that, so far as the present justices are concerned, "nonpublic schools" are, for all practical purposes, "Catholic schools." In spite of this, the court did not strike down the statutes on the simple ground that they were preferences of a particular religion; it treated the schools as schools closely related to a church, but not as themselves churches. This is an important point for future constitutional developments.

Although, in the course of his analysis, the Chief Justice points to several features of the Pennsylvania and Rhode Island programs that give rise to a hazard of excessive entanglement, the burden of his argument is that the statutes pay for parochial school teachers' salaries during the regular parochial school year, and that this creates an unquestionably unconstitutional peril of excessive entanglement. He states:

> In Allen the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character than books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the dangers that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation. (Slip Opinion, p. 12)

Owing to this intrinsic conflict, "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these /secular statutory/ restrictions are obeyed and the First Amendment otherwise respected." The Chief Justice then rings the dealth-knell of the legislation: "These prophylactic contacts will involve excessive and enduring entanglement between state and church."

This is not the place for me to criticize the court's reasoning. I have allowed myself that relief elsewhere. The constitutional point is: government cannot pay the salaries of parochial school teachers instructing regular parochial school students during the regular parochial school year. It cannot pay them either by making supplementary payments directly to the teacher (Rhode Island) or by reimbursing the schools for instructional costs (Pennsylvania).

The practical consequence of this constitutional prohibition is, of course, enormous. Since teachers' salaries account for the lion's share of the current operating costs of any school, the Supreme Court has imposed a ceiling well below 50% of such costs (and probably very close to 30%) on any type of "appropriation aid" to education in nonpublic schools that is aimed at the basic education of all their students. I have emphasized this last clause because the Pennsylvania and Rhode Island programs involved in Lemon-DiCenso were not special programs for impoverished, culturally deprived, mentally handicapped or retarded children. They were "general" programs, despite their secular limitations, and accordingly did not bring into play the special constitutional considerations that would arise in the case of specially disadvantaged classes of school children.

If the Chief Justice had concluded his opinion for the court in Lemon-DiCenso with the invalidation of public subsidies for the salaries of parochial school teachers, the task of deciding which alternative forms of public asssistance would still be constitutional might not be so difficult. The court itself gave the guideline of "secular, neutral, or non-ideological services, facilities, or materials," and there is nothing in Lemon-DiCenso to offset the inference from Walz that tax benefits for education can be extended (as they have been for so many years) to church-related as well as nonsectarian schools, both public and private.

Unfortunately for the constitutional analyst, however, the Chief Justice added Part IV and Part V to his opinion. One paragraph in Part V reads like a total prohibition on aid to education in church-related schools:

> The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn. (Slip Opinion,p.20)

Read, however, in the context of the entire opinion in which this paragraph occurs, the paragraph is obviously an exhortation by the Chief Justice for acceptance of the court's judgment rather than a retraction, at the last moment, of the distinctions made during the course of the opinion with such great care.

What the Chief Justice says for the court in Part IV presents greater difficulty. Quoting my learned co-consultant to this Commission, Professor Freund, the Chief Justice states that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." He goes on to say:

> To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief. (Slip Opinion, p. 18)

The Chief Justice must have realized that he was on extremely delicate constitutional ground (to put it bluntly, because he was telling Catholics to shut up and quit pestering the voters and the legislatures), so he immediately added that the Constitution does not forbid adherents of particular faiths and individual churches to take strong positions on public issues. He tries to distinguish, however, or at least to suggest a distinction, between the right to take a religious position when most of the churches are in agreement with it and the right to take a position against the majority religious agreement. Rather than put words into the Chief Justice's mouth, I will quote him directly:

> Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified. (Slip Opinion, p. 18)

With all respect to the Chief Justice and to the court for which he was speaking, I suggest that in this part of his opinion, he was saying something that was neither necessary to the decision nor defensible as sound constitutional doctrine. The Religion Clauses of the First Amendment, as interpreted by the Supreme Court in the discharge of its highest duty, have, indeed, settled certain fundamental political and religious questions as the law of the land, amendable only by certain difficult processes; but the Free Speech Clause guarantees the right to discuss what the Constitution means, and the Petition Clause guarantees the right to seek legislative redress within constitutional limits. The First Amendment cannot be read to silence anyone peaceably invoking ordinary political processes.

I realize that I am arguing with the Supreme Court about the correctness of what it said in Part IV of the Lemon-DiCenso decision. What is important, however, to this presidential Commission, is the impact of Part IV on Parts I-III. Speaking strictly as an analyst of the decision, my judgment is that Part IV does not retract the careful distinctions made by the Chief Justice in Parts I-III. There would have been no point in writing Parts I-III if Part IV meant that every form of state aid to education in church-related schools is forbidden by the First Amendment because of the dangers of political divisions along religious lines. There would have been no necessity for the Chief Justice to develop the "excessive entanglement" argument, or to insist on the difference between teachers' salaries and secular, neutral, or nonideological services, facilities, or materials.

It cannot be denied, however, that for the immediate future, Part IV hangs darkly over legislation for aid to education in nonpublic schools. The next time a school aid case is argued in the Supreme Court, opponents of such aid will hammer heavily on the political divisiveness argument. In my opinion, a majority of the justices, more fully cognizant of the implications of what they have said for Free Speech and the Right of Petition, will silently retract Part IV.

(b) *Lower Court Decisions:* In the last ten years there have been many school aid decisions by the lower federal and state courts. The *Tilton* and *Lemon-DiCenso* decisions, however, have completely superseded these lower court decisions, with the result that it would not serve any useful purpose of the Commission to engage in an analysis of these earlier decisions on what forms of public assistance may be given to education in nonpublic schools. Moreover, many of these lower court decisions, especially in the state courts, are complicated by questions of state statutory and constitutional law that are not relevant to federal legislation.

Two of the questions, however, set forth in Section 1(b) of this paper, deal with matters not yet directly ruled upon by the Supreme Court. These are:

(4) If some forms [of aid] are permitted by the First Amendment, to what extent is a State free under the Fourteenth Amendment to forbid (in the State Constitution) any assistance to education in church-related schools?

(5) If some forms are permissible, what are the constitutional consequences (especially with regard to "religious preference" and racial segregation) of acceptance of those forms by church-related schools?

Without trying to answer these questions at this point, I will not examine some recent lower court decisions that have a bearing on the answers.

## Freedom of the States to Prohibit Aid

Most states have a provision in their constitutions that prohibits some or all types of aid to church-related schools. For the sake of convenience, I will call this kind of provision the "Blaine Amendment," in memory of the gentleman who tried, in the years following the Civil War, to get such a provision written into the federal Constitution. Because of the existence of these state constitutional limitations on aid, most federal aid-to-education statutes have a "by-pass provision" that enables federal authorities to distribute assistance directly to church-related schools, teachers or students when the particular program in question cannot constitutionally be administered by state authorities.

Despite the Blaine Amendment provisions, state "tax benefits" are generally available to church-related schools. The Blaine Amendments prohibit "appropriation aid," not tax benefits. Moreover, the Blaine Amendments operate only against state assistance to ordinary schooling of ordinary pupils. They do not prevent special provision by the state for orphans, mentally retarded or otherwise handicapped children.

Litigation against the constitutionality, under the Fourteenth Amendment, of state constitutional Blaine Amendments, is a relatively recent phenomenon. In 1947, in the Everson case, the Supreme Court had indicated rather clearly in a dictum that, while the states were free to provide transportation to all school children, they were also free to restrict it to children attending public schools. With the great growth of Free Exercise and Equal Protection litigation, however, during the last 25 years, it is not surprising that some advocates of church-related education have mounted a federal constitutional attack against the Blaine Amendments.

In general, the lower federal and state courts that have ruled on the matter have sustained the federal constitutionality of the Blaine Amendments. History and their near universality in state constitutions are strong arguments in favor of their consistency with the federal Constitution. Moreover, as the Supreme Court of Idaho recently pointed out with great bluntness, the right to the free exercise of religion is not a right to exercise it at public expense.

In a recent decision, however, by the Supreme Court of Michigan, an important limitation of Blaine Amendments has appeared. In November, 1970 the voters of Michigan adopted "Proposal C" as an amendment to the state Constitution. Part of Proposal C read as follows:

> No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.

I have underlined the last clause of Proposal C because, read literally, it would cut off public monies from any public school that engaged in a shared-time or dual enrollment program. The Supreme Court of Michigan declared this part of Proposal C unconstitutional under the Fourteenth Amendment, as violative of equal protection and the free exercise of religion.

Federal constitutional testing of state constitutional Blaine Amendments is still in its infancy. As I have indicated, the Supreme Court has not passed on the question. The weight of existing federal and state lower court authority is solidly on the side of the compatibility of such amendments with the federal Constitution, in so far as the amendments prohibit direct assistance to education in church-related schools. The Michigan decision is an indication that the lower courts may not be so receptive to Blaine Amendments that seek to cut off nonpublic school students from all access to public schools on a part-time basis.

## Constitutional Consequences of Accepting Aid

Another question on which the Supreme Court has not directly ruled is whether a nonpublic school that is partly financed by the government becomes subject, through the acceptance of such assistance, to the strictures of the First and Fourteenth Amendments on governmental activity. The question has usually arisen in the context of "appropriation aid," although a few litigants have raised it with respect to "tax benefits" as well.

Chief Justice Burger's opinion for the court in Lemon-DiCenso is emphatically silent on the subject. I say "emphatically," because the other three justices who wrote opinions in the case all have something to say on the question. Mr. Justice Brennan states:

> Moreover, when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection. (Slip Opinion, p. 11)

Mr. Justice Douglas, speaking for himself and Justices Black and Marshall, goes further:

> Once these schools become federally funded they become bound by federal standards . . . and accordingly adherence to Engle would require an end to required religious exercises. That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of the parochial school. (Slip Opinion in Tilton, p. 5)

Mr. Justice White closes his opinion with the following footnote:

> As a postscript I should note that the Court decides both the federal and state cases on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional. (Slip Opinion, p. 11)

On the basis of these passages, it would appear that five members of the Supreme Court (Douglas-Black-Marshall, Brennan, and White) accept the doctrine that partial government financing of a nonpublic school makes the school "public" for the purposes of the First and Fourteenth Amendments. That, however, is not true, because Mr. Justice White would not prevent the publicly assisted nonpublic school from teaching and practicing religion, so long as it did not discriminate in its admission policies or require all students to participate in the religious activities of the school.

The subject to what extent partial public financing makes a private institution "public" for constitutional purposes is an extremely complicated one, and cannot be dealt with here except in the most summary fashion. One point, fortunately, is absolutely clear: government cannot use private schools as a vehicle to escape desegregation of the public schools. Nonpublic schools, however selective they may be on religious grounds, cannot accept public funds and practice racial discrimination.

What about "religious discrimination"? At this point, various state and federal statutes come into play that might make the constitutional question moot. Statutory considerations apart, however, I do not think that federal and state courts are likely to equate "religious selectivity" with "racial discrimination." There is a vast difference between the federal constitutional treatment of race and religion. The federal and the state governments are forbidden to practice racial discrimination themselves, and Congress is authorized to stamp out most racial discrimination by private individuals. Religion is totally different. Every citizen has a right to the free exercise of his religion, and most citizens exercise that right in some kind of church. Neither Congress nor the state legislatures have any authority to interfere with religious preferences or religious selectivity.

Rather than argue the point further, I will simply report that I am not aware of any case in which a church-related school has been sued for denying an applicant admission on the basis of his religion. Similarly, I am not aware of any reported decisions dealing with a nonpublic school's discharge of, or refusal to hire, a teacher or administrator on the basis of religion (although I have heard that a few such cases are in the works).

The Fourteenth Amendment protects more, of course, than racial equality and the free exercise of religion. The Due Process Clause protects individuals against arbitrary procedures by state agencies, and the same clause in the Fifth Amendment protects them against similar action by federal agencies. If the acceptance of partial governmental support makes nonpublic schools subject to the Due Process Clause, their disciplinary rules and procedures, as well as admissions and personnel policies, are going to be vitally affected.

In the most recent case in this area, a federal district judge held, in a most carefully reasoned opinion, that the involvement of a Catholic high school with, and partial support by, a state government did not render the school subject to the Fourteenth Amendment in its internal affairs. The judge distinguished between constitutionally protected and unprotected activities, and thereby distinguished this case from all those involving racial discrimination. The judge correctly noted that indiscriminate application of the Fourteenth Amendment to all nonpublic schools would destroy private education.

Undoubtedly, if the amount of governmental support of, or involvement with, a nonpublic school were so great that the school was, for all practical purposes, an agency of the state, the school would be bound by the Fourteenth (or in the case of the federal government, the Fifth) Amendment. Similarly, if in the very action of which the plaintiff was complaining (exclusion, refusal to hire, discharge or expulsion), the state or federal government were a partner with the nonpublic school, the Fifth or Fourteenth Amendment would apply. Short, however, of an agency or partnership relationship, nonpublic schools are private and are not bound by the Fifth or Fourteenth Amendments.

### 4. Answers

#### (a) Constitutionality and unconstitutionality of existing forms of assistance:

In expressing my judgments of constitutionality and unconstitutionality, I ought to make it clear at this point that I shall do so in terms of what I think the present members of the Supreme Court have said or will say. Owing to the present 4-4-1 division on the court with respect to some basic questions in the aid-to-education area, any change in the personnel of the court would alter my judgments on certain matters.

Forms that are certainly constitutional:

(1) The traditional tax benefits
(2) Buses, books, school lunches and health services
(3) Secular, neutral, or nonideological services, facilities, and materials provided in common to all school children
(4) Dual enrollment
(5) Payments for record-keeping and testing required by law

Forms that are certainly unconstitutional:

(1) Reimbursement of the school for part or all of a parochial school teacher's salary that is paid for the basic instruction of ordinary parochial school students during the regular school year
(2) Salary supplements paid directly to parochial school teachers for basic instruction of ordinary parochial school students during the regular school year

(3) Tuition payments (whether to parents, students or schools) that are not based on need and that are not restricted to the costs of secular education
(4) Any form that requires a general audit of the nonpublic school books to categorize all expenditures as either "secular" or "religious"

Forms that may or may not be constitutional:

(1) Instruction in nonpublic schools by public school teachers
(2) Tax benefits limited to nonpublic schools, students, teachers, parents or sponsors
(3) Educational payments based on financial need
(4) Special educational programs for children with special educational problems
(5) Sharing of facilities by public and nonpublic schools
(6) "General" voucher systems

(b) Constitutionality and unconstitutionality of proposed forms of assistance:

Most of the forms of aid that have been proposed, but not actually enacted into law, are simply minor variations on one or more of the forms listed immediately above. No truly "general" voucher system, however, is yet in existence, and there is one type of tax benefit under discussion that has not been enacted into law.

In a general voucher system, the government would, in effect, be picking up all the costs of both public and nonpublic education. In the present state of constitutional law, this seems clearly unconstitutional. Government cannot fund religious education in nonpublic schools. What the future holds, however, is not so clear. At the college level, federal and state scholarships have long existed without constitutional controversy, even though students were free to pick church-related institutions for their education. While some parallel can be drawn between a voucher system and a scholarship program, the Supreme Court drew a sharp distinction between higher and lower education in the Tilton, Lemon and DiCenso cases. For the Supreme Court to sustain a general voucher system at the elementary or secondary level, the court would have to say that the right of parents to make a free choice between public and nonpublic schools is so important that it overcomes the traditional prohibition against government funding of religious education. The Supreme Court is certainly not going to say that in the near future. I doubt that it will ever say it.

The type of tax benefit that has been widely discussed, but not enacted into law, is a federal income tax benefit. It would take the form of an "educational expense" deduction or credit. If the benefit is made available to all federal taxpayers, I see no constitutional problem. If, however, the benefit is limited to those taxpayers with children in nonpublic schools, the benefit would be, at best, of doubtful constitutional validity. If the benefit clearly put nonpublic schools in a federally favored position, the benefit would be certainly unconstitutional.

(c) The basic dividing line(s), and the reason(s) therefor:

As I indicated in Section 1(a) of this paper, there are at least three important levels of analysis for each program of public assistance to education in nonpublic schools: the objective, the channel, and the form. I shall use these levels in setting forth the dividing lines between constitutionality and unconstitutionality. I shall indicate my reasons for these dividing lines as briefly as possible, since they are fully explained in the first three sections of this paper.

### The Objective

If the purpose of the legislation is to refrain from taxation, there is no need to distinguish between secular and religious education. If, however, the purpose of the legislation is to provide positive assistance that requires a public appropriation for its funding, then the statute must distinguish between secular and religious education. Some leeway is permissible in the case of public educational programs for the poor or for specially disadvantaged children. Leeway is also permissible in the case of special educational projects that are not part of the basic education of children during the regular school year.

My reasons for these guidelines rest on my analysis of the Schempp, Allen, Walz, Tilton and Lemon-DiCenso decisions and on the practice of the states and the federal government in funding special educational programs for the poor, for specially disadvantaged children, or for objectives that go beyond the basic instruction of school children.

## The Channel

Tax benefits can be given to schools, teachers, students, parents and sponsors. This has been the consistent practice of the federal and state governments. Tax exemptions for houses of worship were explicitly sustained by the Supreme Court in the *Walz* case. The argument would seem to be *a fortiori* for church-related schools performing the dual functions of secular and religious education.

"Appropriation aid," however, can be given to nonpublic schools only in the form of "secular, neutral, or nonideological services, facilities, and materials," at least where basic instruction during the regular school year is concerned. In view of the Supreme Court's specific disapproval of direct payments of money to church-related schools in the Pennsylvania case, it is definitely safer to channel "appropriation aid" to parents or students. Teachers cannot receive state supplements to their basic salaries for parochial school instruction during the regular school year. They should, however, remain eligible to participate in teacher-benefit programs for the assistance of all teachers.

## The Form

Tax benefits can be given in the traditional forms of exemptions and deductions. There is no constitutional reason why tax credits cannot also be used. Tax benefits, however, must not be written in such a way as to favor nonpublic education over public education. A federal tax benefit solely for tuition expenses would probably violate this restriction, since most public schools do not charge tuition. State tax benefits can probably be given solely to nonpublic education, since the state is already bearing the full cost of public education.

"Appropriation aid" can be furnished in the form of money, services, materials, equipment and facilities for secular educational purposes. Money cannot be provided for parochial school teachers' salaries that are paid for the basic instruction of ordinary parochial school pupils during the regular school year. If money is provided for other secular educational purposes, the constitutional question is whether the statutory restrictions on the use of the money are likely to generate excessive entanglement of the government with religious matters. I do not think that excessive entanglement would be a problem with public payments for "mandated services," such as record-keeping or testing that is required by law.

"Secular, neutral, or nonideological services, materials, and facilities" can be given by the government to schools, students, teachers and parents. This type of aid certainly includes buses, books, school lunches and health services, since these were explicitly mentioned by Chief Justice Burger in the Lemon-DiCenso decision. What else this type of aid encompasses remains to be seen. Since, however, this type of aid cannot be stretched to cover parochial school teachers' salaries, this type of aid cannot very well exceed 30% of the current operating costs of a nonpublic school.

Money paid to students or parents by the government to assist in the secular education of school children must be divided into two categories: (1) money paid without regard to the financial need of the parents or the special educational problems of the children, and (2) money paid with regard to such financial need or special educational problems. Money in the first category must be limited carefully to secular educational purposes, and the limitations necessary to accomplish this purpose will almost certainly generate the likelihood of excessive entanglement. Money in the second category should also be limited in some fashion to secular educational purposes; but owing to the special concern of the government for poor and handicapped children, the Supreme Court might be satisfied with fewer restrictions than otherwise. In the case of children totally dependent on the state, the practice has been for the government to make payments for the care and education of these children in many nonpublic institutions, without any specific restriction on the use of the funds to secular educational purposes. In view of the extraordinary need of this category of children, and the absence of sufficient public institutions for their care, the Supreme Court would almost certainly uphold the traditional practice.

## Application of the Guidelines

The application of these guidelines to the forms of assistance that I have labeled "certainly constitutional" and "certainly unconstitutional" requires no elaboration. The forms that I have put in the "maybe" category do not fit the guidelines precisely, and require further testing in the courts. In general, I think that, except for general voucher systems, the other forms in the "maybe" category can be structured in such a way that they would survive scrutiny by the present members of the Supreme Court (or at least five of them). With respect to the sharing of public school teachers and public school facilities, the constitutional key is the maintenance of clear public control. Tax benefits that do not result in a preference for nonpublic schools should cause no problem, and neither should special programs for the poor or specially disadvantaged children. Difficulties will arise, however, if any of these forms is manipulated to provide general aid for the basic instruction of ordinary nonpublic school students during the regular school year.

(d) Constitutionality of exclusion by the State constitution of forms of assistance permissible under the First Amendment:

On the basis of the cases that have been decided so far, a state is free to include in its constitution a provision that bars forms of assistance to education in nonpublic schools that are permissible under the First Amendment. A state, however, may not go so far as to deny general welfare benefits to individuals on the basis of their attendance at nonpublic schools. Neither may a state absolutely prohibit dual-enrollment programs.

(e) Constitutional consequences for nonpublic schools of acceptance of public aid:

Nonpublic schools that accept financial assistance from the government cannot constitutionally discriminate on the basis of race. Such schools, however, do not become public institutions, subject to all the constitutional limitations imposed upon the government, unless their degree of financial or other involvement with the government is so great that they become agents or partners of the government.

## 5. Conclusions

In conclusion, I will summarize the principal points that I consider relevant to the constitutionality of public assistance to education in nonpublic schools.

(a) There are two critical facts: Almost all nonpublic education at the elementary and secondary level is church-related in some degree, and 83% of the students are in Catholic schools. These two facts bring the First Amendment into play.

(b) The Lemon-DiCenso decision deals only with assistance for the basic instruction of ordinary nonpublic school students during the regular school year. It does not eal with assistance during the regular school year. It does not deal with assistance for special projects, summer programs, the poor or specially disadvantaged children.

(c) As a result of the Lemon-DiCenso decision, some forms of assistance are clearly constitutional, some clearly unconstitutional, and some may or may not be constitutional.

(d) The government can give nonpublic education less than it gives public education, but it cannot give it more.

(e) The government cannot pay part or all of the salaries that parochial school teachers receive for the basic instruction that they give ordinary parochial school students during the regular school year. It makes no difference whether the government pays the teacher directly or reimburses the school for salary costs. Moreover, any program that results in the payment of such salaries by the government, regardless of the form in which the program is cast, is certainly unconstitutional.

(d) In determining the constitutionality of various forms of assistance, three levels of analysis should be employed: the objective, the channel, and the form.

(e) There is a fundamental constitutional difference between "tax benefits" and "appropriation aid." Tax benefits do not have to be restricted to secular education; appropriation aid, except in special cases, does.

(f) There is a 5-4 split on the Supreme Court with respect to the channel of "appropriation aid." Five justices say that nonpublic church-related schools can be the channel, at least in certain cases. Four justices say that such schools can never be the channel.

(g) Of the five justices that say that church-related schools can be the channel, only one would permit the forms of assistance declared unconstitutional in Lemon-DiCenso. The other four would limit the permissible forms to tax benefits and "secular, neutral, or nonideological services, facilities and materials." How far "SNNSFM" can be stretched is uncertain, but it seems clear, in view of the Lemon-DiCenso prohibition on basic teachers' salaries, that "SNNSFM" cannot be stretched beyond 30% of the current operating costs of nonpublic schools.

(h) There are still many unanswered questions about the constitutionality of public assistance to education in nonpublic schools. The only way to achieve official resolution of the doubts is to pass the legislation and test it in the courts.

(i) Substantial changes, either in the membership of the Supreme Court or in the educational and constitutional attitudes of some of its members, must occur before substantial assistance, in the form of payments for teachers' salaries, can again be considered constitutional. In the meantime, there is ample room for experimentation with various types of assistance which might make the crucial difference in the immediate future of nonpublic education.

Charles M. Whelan
Fordham Law School
September 13, 1971

# PUBLIC AID FOR CHURCH-RELATED EDUCATION:
## FEDERAL CONSTITUTIONAL PROBLEMS

A paper prepared for the

President's Commission on School Finance

by

Paul A. Freund

September 1971

Harvard University Law School
Cambridge, Massachusetts

# Public Aid for Church-Related Education: Federal Constitutional Problems

Paul A. Freund

This memorandum is concerned only with elementary and high schools (except as decisions concerning universities throw light on the problem) and with the impact of the U.S. Constitution, not with the sometimes more restrictive state constitutions.

Constitutional Framework. The First Amendment contains two pertinent clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." The non-establishment and free-exercise clauses often reinforce each other, as would be the case if Congress were to require that persons attend Mass as a condition of naturalization. On occasion, however, the two clauses may pull in opposite directions, as where Congress provides an exemption for military service only for those whose conscientious objection to war is based on religious training and belief. From one point of view the exemption constitutes respect for the free exercise of religion; from another, it can be regarded as furnishing support for religious training. The Supreme Court has avoided this inner tension by giving the legislative exemption a liberal construction to include those whose objection is based on a conscientious belief that occupies in the mind and life of a non-theistic objector a place equivalent to a belief held by a more conventionally "religious" person. U.S. v. Seeger, 380 U.S. 163 (1965).

The non-establishment guarantee is the one particularly involved in issues of public aid to parochial schools. As an original question it might have been held that the guarantee prohibits only governmental preference granted to a certain religion or to certain sects, but the interpretation has been broader. It might also have been held that the guarantee is not applicable against the States through the Fourteenth Amendment's general guarantee of liberty and property against deprivation without due process; but since the 1940's the Fourteenth Amendment has been held to embody all the guarantees of the First.

A much-quoted definition of non-establishment is that of Justice Black in Everson v. Board of Education, 330 U.S. 1 (1947): "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." The Justice then quoted Jefferson's 'wall of separation.'

Subsequently it will appear that the proscriptions of laws that "aid all religions" cannot be taken literally. Indeed, in the Everson case itself the majority, through Justice Black, sustained the New Jersey law that provided payment for bus fares of children attending non-profit private and parochial as well as public schools, a subsidy that no doubt "aided" the religious activities of the parochial schools, though the basis for sustaining the law was the legitimate secular interest in safety of children on the streets. The four Justices who dissented (Jackson, Frankfurter, Rutledge, and Burton) protested that the majority were not applying their proposed standards to the case. Justice Douglas, one of the majority of five, later declared that he now felt the case to have been wrongly decided.

At this point it will be useful to set forth the principal decisions of the Supreme Court bearing on the non-establishment guarantee.

Bradfield v. Roberts, 175 U.S. 291 (1899) upheld a federal construction grant to a hospital operated by a religious order. The decision, which is still cited with approval, pointed out that the hospital was not operated to advance the cause of the religious order but was maintained for the medical treatment of patients on a nonsectarian basis. (Incidentally, neither that case nor others support the proposition that the fac of incorporation under general law, as compared with ownership by the Church or Bishop, is decisive on the constitutional question. The issue is not one of form but of substance; the form may be relevant as one item of evidence bearing on the substance of what the institution does and is designed to do. The decision in Speer v. Colbert, 200 U.S. 130 (1906), which has been cited to the Commission for the importance of general incorporation, did not involve the First Amendment at all. It presented the question whether a bequest to Georgetown University fell within a Maryland statute making void gifts within 30 days of death to "any religious sect, order or denomination." In construing this provision not to apply, the Court pointed to the terms of the charter of the University. Clearly a more formal criterion is appropriate in interpreting such a provision than in applying the constitutional guarantee).

Cochran v. Louisiana, 281 U.S. 370 (1931) upheld the furnishing by a state of textbooks to parochial schools; but the case was decided before the Fourteenth Amendment was held to embody the guarantees of the First, and the issue decided was only that the grant was not void as being made for a non-public purpose. The issue has become not one of purpose, but of effect and involvement from the standpoint of church-state relations.

Pierce v. Society of Sisters, 268 U.S. 510 (1925) held that a state could not, consistently with the liberty-due process clause, require all children to attend public schools. The case involved both parochial and non-church-related schools, and no special weight was given to the free exercise of religion; indeed, as already stated, that guarantee had not then been absorbed against the states. The decision stressed the liberty of parents to choose the kind of school in which their children would be educated, and the liberty of teachers as well. Of course there was no occasion to consider what implications, if any, the decision might have for a state's constitutional power to give financial aid to church-related schools. At this point it is enough to note that to argue from the premise that a state must accept private schools as satisfying the compulsory attendance laws to the conclusion that therefore the state must support the private schools is a form of logic that few would advance. The issue is not one of logical inference, but rather whether government may, if it chooses, support parochial-school education in some way as a means of implementing parental choice consistently with the policies underlying the non-establishment clause. Thus we recur to our basic question.

Everson v. Board of Education, 330 U.S. 1 (1947), already referred to, upheld, 5 to 4, the reimbursement of parents for bus fares paid to a public transportation system for the transportation of children to and from school, including parochial schools. While noting that the establishment clause was historically directed against taxation for the support of religious training, Justice Black's opinion viewed the bus-fare program as akin to the furnishing of public services such as fire and police protection to all alike; surely traffic officers, the Court remarked, may serve to protect all children, regardless of the nature of their school destination. The bus service was deemed a safety measure, a public-welfare benefit of general applicability that carried only an incidental benefit to the school.

McCollum v. Board of Education, 333 U.S. 203 (1948) held unconstitutional, with one dissent, a program of released-time education in the public schools, whereby religious teachers employed by private religious groups were permitted to come to the schools for 30 minutes a week for voluntary instruction in lieu of other exercises of the school. Justice Black's opinion concluded: "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."

Where, however, religious devotion or instruction in outside religious centers was made possible by a system of released or dismissal time for students whose parents so requested, the plan was upheld. Zorach v. Clauson, 343 U.S. 306 (1952). The 7 to 2 decision, per Douglas, J., analogized the plan to the excusal of individual students to attend outside religious services on their religious holidays. Reaffirming McCollum, the Court nevertheless felt that to extend it to the present case, where no publicly supported facilities were used, would evince hostility to religion rather than a constitutional mandate of separation.

After McCollum, there should have been no great surprise over the unanimous school-prayer decisions. Engel v. Vitale, 370 U.S. 421 (1962) held unconstitutional an officially composed prayer which pupils were to recite at the opening of each school day, with provision for excusal of those whose parents objected. Abington v. Schempp, 374 U.S. 203 (1963) struck down a similar program, where daily reading from the Bible, without comment, or a prayer, utilized selections made by participating students. The opinion noted that here the non-establishment and free-exercise clauses coalesced in their impact, though the emphasis was on the former. Concurring, Justice Brennan stated that we "may not officially involve religion in such a way as to prefer, discriminate, or oppress, a particular sect or religion. Equally the Constitution enjoins those involvements of religions with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice."

It should be remarked that the exemption privilege in the prayer cases did not save the program under the establishment clause. In contrast, when Jehovah's Witnesses challenged the flag salute in public schools as a religious ceremony they were simply held to be entitled to an exemption. Board of Education v. Barnette, 319 U.S. 624 (1943). The point of the comparison has relevance to our problem. It is occasionally argued that since the Court has given a broad meaning to religion, as in the conscientious objector cases, it follows that the "secular humanism" conveyed in the public schools is a form of religion, and therefore the government must (or may) maintain neutrality by giving support to education in sectarian religious schools as well. The argument is really a play on the word religious. The broad definitions have been accepted for purposes of the free exercise guarantee, to protect idiosyncratic beliefs having the force of religion for the believer; but to adopt a similarly broad conception of the non-establishment clause would place conventionally secular governmental programs in bizarre jeopardy. Thus, a Christian Scientist may refuse a blood transfusion for himself at a municipal hospital, because he regards it as religious (sinful), but it hardly follows that the program must be abolished, or that to maintain neutrality the government must pay for the services of a practitioner of religion who performs for the believer the function that surgical intervention performs for the rest of the community. Free exercise and non-establishment cannot be equated in their definitions of what is religion or religious.

Board of Education v. Allen, 392 U.S. 236 (1968), by a 6 to 3 decision, upheld a New York statute providing for the loan of secular textbooks to all pupils in grades 7 through 12 of all schools, including private and church-related schools. Books were required to be approved by a public board of education and were books designated as texts in the school attended. The majority, through Justice White, treated the case somewhat abstractly, in the absence of a factual record, as raising the question whether such a plan was necessarily invalid. Citing the bus-fare decision, the opinion acknowledged that "perhaps free books make it more likely that some children choose to attend a sectarian school," but asserted that "the financial benefit is to parents and children, not to schools," since "the books are furnished for the use of individual students and at their request." (opinion, note 1). The Court declined to conclude, on the "meager record" before it, "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." Dissents were delivered by Justice Black, the author of the bus-fare opinion, who protested that that decision, which went to the "verge", was being distorted, in view of the ideological difference between transportation and teaching from textbooks, and by Justices Douglas and Fortas, who perceived in the plan more involvement between church and state than the majority were prepared to find.

The Allen decision, resting as it did on a barren record and dealing with a limited subject-matter, was equivocal in nature. It might mark a new base on which the Court could build constitutional doctrine favorable to other kinds of aid, as the Court seemed to build on the bus-fares case, or it might turn out to be limited to its special facts. The directional signals were not at all clear. The majority seemed unready for a more definitive and comprehensive analysis of principles.

Walz v. Tax Commission, 397 U.S. 664 (1970), marked the beginning of such an analysis. Although it involved exemption of church property from property taxation, and not expenditures for education, the approach can be seen to have foreshadowed the recent decisions on governmental payments. Chief Justice Burger wrote for the Court, with only Justice Douglas dissenting.

The opinion stresses the continuous history of tax exemption for church-owned property, extending through almost 200 years, the uniform course of decisions upholding it, and the absence of any appreciable controversy or political-religious divisiveness on the issue. It is enjoyed by all churches, regardless of their doctrinal tenets, and by a multitude of other charitable and educational institutions. The tradition of exemption and the broad generality of its coverage are significant not only on historical grounds but also as muting the involvement of church and state, by virtue of the long tradition and the generality of the practice, which does not focus on a sectarian issue.

The Chief Justice considers whether there is a secular purpose in the exemption and concludes that there is: The purpose is neither the advancement nor the inhibition of religion, but the protection of many institutions devoted to moral and mental improvement from the inhibiting burden of taxation and the risk of loss of their properties for nonpayment of taxes. A legitimate purpose "does not end the inquiry, however. We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion." On this issue the opinion marshals a congeries of characteristics that leave tax exemption on the safe side of the line. Taxability would actually raise more problems of involvement than exemption. As noted above, history and generality minimize the risk of excessive involvement. This is "benevolent neutrality".

It is in no realistic sense a "foot in the door" or "the nose of the camel in the tent."

Justice Brennan, concurring, likewise stressed history and tradition, and the "breadth of this scheme of exemptions," which "negates any suggestion that the State intends to single out religious organizations for special preference." Moreover, in contrast to subsidies, although both provide economic assistance, exemptions are a "passive" involvement. "Thus, 'the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church.'"

Justice Harlan, also concurring, emphasized the criterion of neutrality, both for its own sake and as an assurance of non-involvement. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." Although exemptions and subsidies are alike as an economic matter, "Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions." Justice Harlan reserved for a later case, however, the question of direct aid or subsidies, when it would be necessary to consider "the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided."

The decisions of June 28, 1971. By far the most relevant decisions are those of the Supreme Court on June 28, 1971. The decisions are especially significant because the cases holding unconstitutional certain state aid for secular instruction in parochial schools were decided with only one dissenting vote (White, J.), and Federal building grants to universities, as applied to church-related institutions, were upheld only by a close 5 to 4 vote.

Lemon v. Kurtzman struck down a Pennsylvania law that appropriated funds for the "purchase of services" in parochial (as well as other private non-profit) schools. The services purchased were a part of teachers' salaries, textbooks, and instructional materials for "secular subjects." The statute prohibited reimbursement for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Textbooks and materials for which reimbursement could be received had to be approved by the Superintendent of Public Instruction, who in fact was authorized to make the "purchases." Schools seeking reimbursement were required to maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service;" these accounts were subject to state audit.

Earley v. DiCenso struck down a Rhode Island law providing a 15 percent salary supplement for teachers in parochial (and private non-profit schools) at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers were required to teach only courses offered in the public schools, using only materials used in the public schools, and to agree not to teach courses in religion.

It is obvious that each state undertook carefully to avoid the constitutional pitfalls of unconditional, across-the-board subsidy of parochial schools. Each state attempted to identify and separate the "religious" and "secular" components of the educational process in those schools. These efforts proved unavailing. The more the state strove to escape the pit of outright financial support of the religious activity of sects maintaining schools, the more the state became mired in the entanglement of church and state through surveillance, audits, the likelihood of continual pressure for increased aid, and intensified political diviseness of religious sects arrayed against each other in the continual struggle over the government budget.

Thus a program of state aid poses a dilemma: it must not foster a particular religion or set of religions, or "primarily" give financial support to religion generally; but in seeking to divorce the secular from the religious aspects of the beneficiaries the program must not unduly entangle state and church. This is what Justice White, dissenting, characterized as the "insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught -- a promise the school and its teachers are quite willing and on this [Rhode Island] record able to give -- and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." Even Justice White, however, would have remanded the Pennsylvania case for a trial to determine the truth of the allegation in the complaint that in fact there is a "blending of sectarian and secular instruction," in which case there would be an invalid "financing of religious instruction by the State."

The opinion of the Chief Justice, for the rest of the Court, is based rather on a "conflict of functions [that] inheres in the system." The system is "dedicated to rearing children in a particular faith," so that "the potential for impermissible fostering of religion is present." The Court here was speaking of subsidized teachers. Similarly with the Pennsylvania program of "purchase of services", the Court was impressed by inherent dangers: "The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow."

The Court's opinion does not contain -- indeed it disavows -- any neat formula for determining the line of unconstitutionality in the area of public aid to church-related education. Conclusions and forecasts must be based on the Court's analysis, the language and spirit of the opinions, and the explanations given of related precedents.

The Court's analysis is in terms of three "cumulative criteria": "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citing language in the Allen case]; finally, the statute must not foster 'an excessive government entanglement with religion' [citing the Walz case]."

On the score of purpose, the statutes were not vulnerable, for they were intended to enhance the quality of secular education. On the score of primary effect, the Court found it unnecessary to decide the point beyond observing that the legislatures recognized the need for precautions to guarantee the separation of religious and secular activities as beneficiaries of programs of public aid. The Court passed, then, to the criterion of entanglement. Under this criterion the Court managed to consider the several policies that underlie the non-establishment guarantee, notably voluntarism, neutrality as between religions or between religion and non-religion, and avoidance of undue involvement of the state in the affairs of a church, and of churches in the affairs of the state. The emphasis is on neutrality and the issue of involvement. The two are merged in this statement by the Chief Justice: "Here [distinguishing Walz on exemption from tax] we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups."

The spirit of the opinion, if it can be put concisely, is that the line should be held where it has been traditionally drawn. "We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation." (Justice Brennan's concurring opinion emphasized the constitutional tradition in the states as well as on the national level against public subsidies to church-related schools. Justice Brennan stressed the danger to religion from dependence on governmental aid, a threat as much in the background of the First Amendment as the cognate threat of intermeddling by churches in governmental processes.) The court warns against the "momentum" and "downhill thrust" that are set in motion by a decision that goes to the "verge," particularly in a field where pressures, if yielded to, can be expected to mount.

Nowhere is there explicit encouragement or suggestion that in some different form the aid to church-related education could be upheld. The concluding passage in the opinion seems designed to encourage, on the contrary, self-reliance by church-related schools: "The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that Government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn." The constitutional lines are drawn in these cases, deliberately, in a non-"innovative" way.

Tilton v. Richardson sustained, 5 to 4, the federal construction grant program for colleges and universities, with the qualification that the prohibition on use of the constructed facilities for sectarian instruction or worship or in connection with any divinity-school program must extend through the life of the facilities. For the majority, the Chief Justice distinguished the cases involving elementary and high schools, on the ground of a difference in principal or primary effect of the programs and in the extent of entanglement.

The record disclosed no evidence that the four church-affiliated institutions in the case imposed religious restrictions on admissions, required attendance at religious activities, compelled obedience to doctrines or dogma of a faith, or sought to indoctrinate students or to proselytize. If such a pattern were shown, a challenge could be made to the application of the federal statute. On the issue of entanglement, the Court pointed out that university education is characteristically marked by critical internal intellectual standards and the relative independence of mind of the students. With a different mission from the church-affiliated schools, with a more religiously diverse student body and faculty, there is less need for intensive governmental surveillance to determine whether government aid is supporting religious activities. Moreover, the facilities furnished are non-ideological and the aid is not continuing but on a one-time, single-purpose basis. "No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts" than the state plans in the school cases. The absence of "religious aggravation on this matter in the political process" may possibly be explained "by the character and diversity of the recipient colleges and universities and the absence of any intimate continuing relationship or dependency between government and religiously affiliated institutions." In fact, it was stated during the debates on the bill in the Senate that of all colleges and universities 743 were public, 515 private nonsectarian, and 842 sectarian./ 109 Cong. Rec. 19495. The spread of beneficiaries is reminiscent of the point made in Walz on tax exemption, and contrasts vividly with the concentration of beneficiaries of state special school-aid programs, where the vast majority in the class of new beneficiaries are enrolled in schools affiliated with certain churches.

Policies of the Religion Clauses and Standards to Vindicate Them. The foregoing analysis and resumé of decisions has reflected certain basic policies embodied in the religion clauses of the Constitution. These may be succinctly stated as voluntarism, official neutrality, and the God-Caesar principle, avoidance of undue involvement of the churches in the state and of the state in the churches. Each of these policies has a kind of delusive simplicity about it. As was said by Justice Harlan, concurring in Walz v. Tax Commission, 397 U.S. 664, 694 (1970), "I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point. Two requirements frequently articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism'" (citing Goldberg, J., in the Schempp case, 374 U.S. 203, 305, and Engel v. Vitale, 370 U.S. 421).

Voluntarism of religious belief and practice is a policy embodied in both the free-exercise and establishment clauses. The more egregious forms of state intervention to advance or inhibit religion would at once run afoul of this guarantee. It would forbid alike a requirement or a prohibition of church attendance. Voluntarism includes the policy of religious pluralism, respect for a diversity of sects and beliefs. And yet the fostering of pluralism by the state does not necessarily mean that such a measure is consistent with the First Amendment, as, for example, if a state, concerned over the concentration of church membership in a few sects, were to offer a bonus to new sects as they attracted more members. Here the fostering of pluralism would obviously clash with the co-ordinate constitutional policy of neutrality.

Neutrality is a concept of notorious subtlety, like equality or equal treatment, with which it is closely allied. In considering whether the state is acting non-neutrally, it is essential to be clear about what activities or institutions are being compared. Neutrality is like a prism, through which an object may take on different appearances depending on how the prism is held to the eye of the observer.

To take a homely example, suppose that a state requires a formal ceremony of all who seek to be married, and that it maintains at public expense a free public service to that end. Some couples are obliged by religious conviction to eschew a civil ceremony and exchange their vows in church before a minister. This form of ceremony satisfies the legal requirement. Must, or may, the state compensate the minister or reimburse the couple for the expense involved? Is it non-neutral to do otherwise? The answer may depend on how we view the comparability of the two ceremonies. Is the church wedding simply the equivalent of the civil wedding with something added, or is it different enough to conclude that the aid given to religion is not a form of neutrality? Suppose that in a high school public-speaking class the pupils are required to memorize and recite a passage of their choice that has particularly impressed them by its loftiness of spirit. Some choose a speech of Lincoln, others the Lord's prayer. Would a disqualification of a prayer be non-neutral? The answer may depend on how the prayer is viewed, whether as equivalent to a noble secular address or as essentially different because of the devotional or ritualistic component; this may depend in turn on the atmosphere of the delivery. In comparing public and parochial schools the Court found an essential dissimilarity. In comparing universities the Court found an essential similarity. (If, as is sometimes asserted, some public schools are in actual operation sectarian in their presentation of materials, the remedy would seem to be not the support of avowedly church-related schools but the correction of the conditions in the public school. This was the course pursued successfully with respect to the exclusion of Darwinian biology from the curriculum, which was held unconstitutional as a violation of the establishment clause. Epperson v. Arkansas, 393 U.S. 97 (1968).

There is a further complexity in using the concept of neutrality in the context of parochial-school education. Comparison must be made not only between religion-oriented and non-religious activities but between the activities and institutions of different religious groups. If, for example, support were given to church-related schools, those sects that are doctrinally and actually opposed to the fusion of religious and "secular" education could complain that as to them the support was non-neutral. Religious education, they could argue, is conducted by them in Sunday schools, and to the extent that the religious component of education is supported by aid to parochial schools, support is likewise due to the Sunday schools of the separationist sects. Thus the contest for state support in the political arena arrays sect against sect, doctrinally and institutionally, each in the name of neutrality. We are led at this point to the policy of mutual avoidance of undue involvement of church and state.

Avoidance of undue involvement in each other's affairs is a guarantee of both religious and political integrity. The First Amendment reflects both Jefferson's concern for the political process and Jonathan Edwards' for the religious: in Edwards' "The Garden and the Wilderness" he warned of the dangers if the wilderness of the state were to invade the garden of the church.

Undue involvement, or entanglement, may take the form of surveillance by government, intermeddling by church or state in decision-making by the other, or involvement of the sects in the political process as a concomitant of governmental involvement in the domain of religion. ". . . government involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion." (Harlan, J., in Walz v. Tax Commission, 397 U.S. 664, 695).

Of course religious beliefs do influence attitudes and positions in the political process, whether concerning abortion or obscenity or divorce. Public aid to church-related education, however, presents the problem in a particularly acute and compounded form. Here we are dealing with political involvement (a) on an institutional basis, where a church seeks to secure public aid for the very functioning of the religious institution itself, and not merely to advance a position on an issue of public policy on which a religion has something relevant to say; (b) where the political focus is centered on the religious (sectarian) aspect directly and over-whelmingly, not incidentally or collaterally; (c) where the sects themselves will be in political conflict because of their doctrinal differences; and (d) where, if support is given, the institutionally divisive issue becomes open-ended, of a kind that is ongoing and calculated to escalate. Of course religious institutions have rights of expression, but these are not always identical with those of other groups. Thus, in the political arena, a pacifist party would clearly be legitimate, but the same could not be said of a Quaker party.

It is instructive to recall how the criteria of neutrality and non-involvement have been applied, in turn, to property-tax exemption, federal building subsidies to universities, and subsidies to non-public schools. In so doing one can appreciate the highly sensitive concern of the Court for the policies of neutrality and non-entanglement, and the discerning practical approach the Court has taken in differentiating the cases.

In order to effectuate these constitutional policies, the Court has examined legislation from the point of view of purpose and of effect. Rarely can a law in this area be found to have an illegitimate purpose. Even school prayers were designed to serve the educational purpose of creating an atmosphere of serenity and humility in the classroom. A law that required belief in God as a condition of holding state office was doubtless enacted in order to help assure honest and faithful civil servants; yet despite its praiseworthy purpose it was ruled unconstitutional.

Torcaso v. Watkins, 367 U.S. 488 (1961). The more crucial question, in most cases, is whether a legitimate purpose is being achieved through measures that produce or require illegitimate effects. Such effects are those that conflict with the policies of the religious guarantees: voluntarism, neutrality, and mutual avoidance of undue involvement. These have already been discussed.

Conclusions on Specific Forms of Aid. In light of the decisions and the constitutional philosophy they reflect, what are legitimate and illegitimate forms of aid for church-related education? Some warrant clearer answers than others.

Bus fares. Although one member of the Court who was in the majority of five in the Everson case (Douglas, J.) has since recanted, it is reasonably clear that the decision is stable. The analogy to general welfare services like fire and police is a strong one. The service is highly diffused, non-ideological, and has only an incidental effect on the support of religious education.

Other welfare services: lunches, vaccinations, nurses' care. These services belong, in my judgment, with bus fares. They protect the health of children wherever the children are found at school. The fact that church-related schools may be relieved of a cost they might otherwise assume is not decisive in so general, non-ideological a welfare program. This is not to subscribe to the dichotomy between "child-benefit" and "school-benefit" sometimes suggested. Candor and realism compel the acknowledgment that both benefit here as they would in a program of general financial grants to the schools. It is not a question of identifying child or school as the beneficiary, but of maintaining neutrality (generality), minimal ideological impact, and nonentanglement of church and state.

Textbooks. The Allen case was distinguished, not overruled, in the recent decisions. The distinctions are not very solid ones (e.g., Justice Brennan in Lemon pointed to an obscure fact in the Allen case, that the costs of books had previously been borne by the parents, not the schools, and so the aid was to the former rather than the latter -- a highly formalistic and adventitious distinction). Justice White, the author of the Allen opinion, dissented in the recent cases, a fact pointing up the divergence of the decisions. Nevertheless, I believe that in the interest of stability of judicial decision Allen will continue to be followed, but limited to its facts, i.e., to the loan to pupils of approved "secular" textbooks, perhaps on the analogy of a public lending library.

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Equipment, facilities, etc. The Pennsylvania plan, held invalid, included provision for the purchase of "secular" teaching materials, not limited to books. The great difficulty the Court had in sustaining even building grants for universities, upheld in considerable measure because of the difference between church-related universities and church-related schools, indicates that the latter could not be made the beneficiaries of a similar program merely because buildings are "non-ideological" facilities.

Shared time. Some students of the subject regard shared-time programs as invalid, even though public-school facilities and teachers are used. There is, to be sure, the risk of political involvement by the churches in promoting and perhaps unofficially administering the program, and if the pupils from parochial schools are placed in separate classes there is also a certain invidious segregation on the basis of religion. Nevertheless I believe that the plan can be regarded as a valid arrangement whereby parochial-school pupils are treated, at their request, as part-time public-school pupils. There is, of course, indirect aid to the religious component, but the inherent control and supervision within the public schools, where I assume the instruction would be the same for all, mitigates the involvement. There is some analogy to the form of released-time for religious instruction outside the public school, sustained in the Zorach case, although the proportion of time outside the public school is of course substantially different.

Grants to pupils or families; Voucher plans. To route public subsidies for church-related education to pupils or families rather than to the institutions serves to highlight the purpose of fostering pluralism and freedom of choice. But these purposes are plainly inherent as well in direct grants to the institutions, as the supporters of such grants rightly argued when their validity was still unsettled. The purpose in either case is a proper one; the issue turns on effects. To predicate a different constitutional result on a change in the mechanics of the payment of public funds would trivialize the constitutional guarantees and the decisions enforcing them. (The differences between payments and exemptions from property tax are, on the other hand, substantial, as elaborated in the Walz case already discussed.) Grants to individuals might not contain restrictions on use like those dealt with in the recent Pennsylvania and Rhode Island "purchase of services" cases; but this circumstance only shifts the plan to the other horn of the dilemma, where the comparable plan of institutional subsidy would be unconditional, across-the-board payments to the church-related schools in proportion to the number of students enrolled in each. Such a plan would stand no more firmly, to understate the point, than those held unconstitutional.

A voucher plan providing for limited grants would simply be a variation in form. But a voucher plan as conceived by some proponents of new departures in education would provide total-cost grants per pupil that would enable a family to broaden its range of choice to include a variety of educational enterprises, old and new. Such a full-payment plan, whereby a voucher would be usable at public, private, church-related, cooperative, and other experimental kinds of schools, might be viewed as a measure whose principal impact would not be on church-related schools but on a significantly wider constituency. In this respect a full-cost voucher plan would differ in its effects from direct subsidies or fiscal supplements to families for non-public school education. The plan might be regarded as containing safeguards of neutrality and non-involvement akin to those in tax exemptions applicable broadly to charitable and philanthropic institutions, including those having affiliations with a wide spectrum of religious groups.

There would be a certain irony in sustaining a full-cost voucher plan that included church-related schools while holding invalid systems of merely partial aid; but the perimeters of the plan, affecting its scope and character, would be different. The focus of the political issue would not be on support of religious schools; greater diffusion of benefits among a broad constituency, as with tax exemptions and grants to universities, would mean diluting the risk of "religious gerrymandering" against which Justice Harlan warned.

I am by no means confident that a full-scale comprehensive voucher plan would be valid. I only suggest that constitutionally it holds greater promise than a program of modest but not self-limiting grants to pupils that would produce the same effects under the present patterm of education as those to the institutions themselves, held to be unconstitutional.

Whether a voucher system would entail, as a corollary, non-preferential practices and other conditions on church-related schools is considered at a later point.

Tax deductions and credits. Deductions and credits against income taxes for part or all of the costs of non-public school tuition and related expenses raise similar questions of neutrality, generality, and involvement. A large measure of discretion rests with the legislature in determining the definition of net income for tax purposes, but deductions and credits are not outside the sphere of constitutional constraints; surely a deduction for contributions only if made to a Protestant church would be clearly beyond the pale. Like grants to pupils or families, deductions or credits avoid some problems of administrative entanglement, but again at the cost of indirectly furnishing aid to the total enterprise of a religiously affiliated school. As in the case of tuition grants, the problem might be mitigated by the breadth and scope of the interests that would benefit. Thus, for example, contributions to churches are included in charitable deductions; they fall within the broad contours of the category. A deduction or credit for expenses of non-public school attendance would not, in my judgment, stand on surer ground than grants to pupils or families for that purpose. The similarity is underscored when we consider what would probably be a necessary corollary, in economic fairness, to deductions or credits, namely, a form of negative tax or payment, to those whose incomes are below the line at which a deduction or credit would have an opportunity to attach.

Breadth and generality, diffusion of benefits and dilution of political-religious entanglements, might be secured by extending the deduction or credit (and ancillary payments) to a wide range of expenses incurred on behalf of a child's educational, cultural, and physical development, e.g., expenses for extracurricular instruction, including religious instruction, books, athletic lessons, etc. Of course the ultimate point on the spectrum would be simply an increase in tax allowances for children, perhaps geared inversely to the gross income of the parent.

Preferential or exclusionary policies of schools. If some form of tuition grants or tax credits were attempted, what would be the consequences for the internal policies and practices of non-public schools? The giving of governmental financial support would alter the "private" character of the schools, at least in some respects, for purposes of bringing them under the constraints of the Bill of Rights applicable to government itself. This result would most clearly follow with respect to discrimination in admissions or employment based on race, color, or national origin. Justice Douglas, in his dissent in Lemon v. Kurtzman, pointed out (n.17) that "Grants to students in the context of the problems of desegregated public schools have without exception been stricken down as tools of the forbidden discrimination." (Citations omitted.)

Religious preferences or discrimination in church-related schools presents a more subtle question. Racial discrimination or segregation is repugnant to our national policy, while religious separatism is an aspect of the pluralism that is part of our tradition. And yet the problem remains of the extent to which government may give support to institutions that exclude or discriminate on religious lines. The question was faced by Judge Coffin in the three-judge court in the Rhode Island case. His opinion, which ruled the act unconstitutional, was quoted with approval by Justice Brennan: "Applying these standards [equal protection] to parochial schools might well restrict their ability to discriminate in admissions policies, . . . and in hiring and firing of teachers. At some point the school becomes 'public' for more purposes than the Church would wish. At that point, the Church may justifiably feel that its victory on the Establishment

Clause has meant abandonment of the Free Exercise Clause." (Quoted from 316 F.Supp., at 121-122.)

Judge Hastie, dissenting in the three-judge court in the Pennsylvania case (a position upheld by the Supreme Court) went even further, suggesting that the necessary degree of constraint on church-related schools would make the program of aid itself unconstitutional: "Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty, whatever sacrifice of appropriate religious objectives may result. I cannot square such state intrusion into religious affairs with the concept of separation of church and state which the First Amendment implements." (310 F.S. at 52).

Moreover, Justice White, although favoring the validity of the Pennsylvania and Rhode Island statutes, adverted to the situation "if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional."

In the context of grants to pupils or tax credits, perhaps these questions of equal protection would be mitigated, like the question of the basic validity of such plans, as the breadth of the plans increased, so that as practical freedom of choice increased, the effect of internal preferential policies would be diluted. But the problem is a serious one, and may give pause to the proponents of aid, as it did to the judges who have been quoted.

## APPENDIX

We have been asked to consider specifically certain state and federal legislative plans, all drafted before the decisions of June 28, 1971.

The plans fall into two categories, grants to families and tax credits.

In the first category are measures in Illinois, Maryland, Vermont, and the House of Representatives.

The Illinois bill (S.B. 1196) provides for grants to low-income families, limited in use to education in secular subjects and activities. Supervision is to be under the Superintendent of Public Instruction. The difference from the invalid "purchase of secular services" plans is, in my judgment, merely formal. The case for validity would be stronger as the ambit of grants to families was enlarged.

The Maryland bill (ch. 7) provides for scholarships to non-public schools, geared in amount inversely to parental income. A voucher system is employed. Open enrollment is mandated, except for preference to students presently enrolled. Presumably no other constraints on religious practices in the schools are contemplated. The plan appears vulnerable in the same way as the Illinois plan. The horn of general aid is substituted for that of "secular" instruction, but the dilemma remains.

The Vermont measure (No. 114) provides for state aid to towns and school districts, available for non-public as well as public schools. The aid is for transportation, advanced instruction, supervision and teachers' salaries, limited to secular subjects. The plan appears to be invalid except for transportation of pupils.

H.R. 128 provides for per-pupil grants to parents for education or to public school districts. The plan appears invalid under the principles already discussed.

In the second category are the Minnesota plan and H.R. 1067.

The Minnesota plan (ch. 944) provides for a limited tax credit for expenditures on tuition, fees, and textbooks in non-public schools, with a provision for grants to low-income parents where the credit is unavailing. As set forth in the foregoing memorandum, a tax credit plan runs afoul of basic constitutional objections of political-religious entanglement unless, perhaps, the credit is extended to a broader range of expenditures for the child's intellectual and spiritual development.

H.R. 1067 provides for a tax deduction for expenditures at non-public schools. This plan is vulnerable in the same way as a tax credit, with the added objection that a deduction, unlike a credit, becomes more valuable as the taxpayer's bracket grows higher.